

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|--|---|------------|
| In the Matter of: |) | |
| |) | |
| Falcon Cable Systems Company II, L.P. |) | CSR-6196-A |
| d/b/a Charter Communications |) | |
| and |) | |
| Falcon Telecable, a California Limited |) | |
| Partnership d/b/a Charter Communications |) | |
| |) | |
| For Modification of the Medford-Klamath |) | |
| Falls, Oregon DMA |) | |

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 2003

Released: November 12, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Falcon Cable Systems Company II, L.P. d/b/a Charter Communications and Falcon Telecable, a California Limited Partnership d/b/a Charter Communications ("Charter") filed the above-captioned petition for special relief seeking to modify the Medford-Klamath Falls, Oregon designated market area ("DMA") with respect to television broadcast station KBLN (Ch. 30), Grants Pass, Oregon ("KBLN"). Specifically, Charter requests that KBLN be excluded, for purposes of the cable television mandatory broadcast signal carriage rules, from the cable systems serving Klamath Falls, Oregon and Alturas, California. An opposition to this petition was filed on behalf of Better Life Television, Inc., licensee of KBLN, to which Charter replied. For the reasons stated below, we grant Charter's request.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues* ("Must Carry Order"), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.¹ A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.² A DMA is a geographic market designation that defines each television market exclusive of

¹8 FCC Rcd 2965, 2976-1977 (1993).

²Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 C.F.R. § 76.55(e); see *Definition of Markets for Purposes of the Cable* (continued...)

others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.³

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.⁴

In considering such requests, the 1992 Cable Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as –

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁵

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market.

(...continued from previous page)

Television Broadcast Signal Carriage Rules, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

³For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁴47 U.S.C. §534(h)(1)(C).

⁵*Id.*

* * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁶

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁷

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(2) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relation to the service areas.

Note to Paragraph (b)(2): Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁸

(3) Available data on shopping and labor patterns in the local market.

(4) Television station programming information derived from station logs or the local edition of the television guide.

(5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

⁶H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁷*Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

⁸The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

(6) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.⁹

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

III. DISCUSSION

5. The issue before us is whether to grant Charter's request to exclude KBLN from mandatory carriage on the subject cable systems.¹⁰ All of the communities at issue are located in the Medford-Klamath Falls DMA, as is KBLN, which is licensed to Grants Pass, Oregon. Considering all of the relevant factual circumstances in the record, we believe that the market modification petition is a legitimate request to redraw DMA boundaries to make them congruous with market realities.

6. The first statutory factor we must consider is "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community."¹¹ Charter states that KBLN has never been carried on the subject cable systems.¹² As such, Charter argues, there would be no disruption to established viewing patterns nor would grant of its request deprive KBLN of any existing cable audience. KBLN states that while Charter is correct that it has never been carried on the cable systems, it points out that it only went on-the-air in October 2001.¹³ KBLN notes that the Commission has previously given little weight to the historic carriage factor in cases involving new stations.¹⁴ Charter argues that the Commission has consistently held that it will consider historical carriage along with other market modification criteria.¹⁵ Charter states that in this instance,

⁹47 C.F.R. §76.59(b).

¹⁰KBLN points out that the Commission recently ordered Charter to carry its station on the Klamath Falls and Alturas cable systems. See e.g., *Better Life Television, Inc., v. Charter Communications*, 18 FCC Rcd 9410 (2003); *Better Life Television, Inc. v. Falcon Cable*, 18 FCC Rcd 11048 (2003). Charter states it cannot be required to commence carriage of KBLN unless and until the market modification petition is resolved in KBLN's favor. Charter asserts that if KBLN prevails, it will comply with its must carry obligations to carry KBLN, provided the station does, in fact, provide a signal of sufficient strength and quality. See Reply at 4, n.8.

¹¹47 U.S.C. §534(h)(1)(C).

¹²Modification at 3.

¹³Opposition at Exhibit 1.

¹⁴*Id.* at 3, citing *Avenue TV Cable Service, Inc.*, 11 FCC Rcd 4803, 4811 (1996); *Time Warner Entertainment Co., L.P.*, 12 FCC Rcd 22069, 22074 (1997).

¹⁵Reply at 3, citing *Time Warner Cable*, 12 FCC Rcd 23249, 23254 (1997) (recognizing "[t]he fact that WGOT-TV has not historically been carried on Time Warner Cable's cable system serving the Communities is therefore probative and, while not decisional, will be taken into consideration as a factor in favor of the requested market modification."); see also *TCI of Illinois, Inc., et al.*, 12 FCC Rcd 23231, 23241 (1997); *Dynamic Cablevision of Florida, Ltd.*, 11 FCC Rcd 9880, 9889 (1996), *aff'd*, 14 FCC Rcd 13783 (1999).

because KBLN has failed to comply with the other statutory and non-statutory factors, this factor weighs in favor of deleting the communities from KBLN's market.

7. Second, we consider "whether the television station provides coverage or other local service to such community."¹⁶ Charter argues that, according to a Longley-Rice propagation study, KBLN does not provide a Grade B signal to either Klamath Falls or Alturas.¹⁷ Charter maintains that this is not surprising considering that the average distance between KBLN's city of license, Grants Pass, and the cable communities is 119 miles.¹⁸ Charter states that this distance easily exceeds those found to justify prior market modification requests seeking exclusion.¹⁹ Charter argues that the lack of nexus between KBLN and the communities is also demonstrated by the driving distance of nearly 200 miles between Grants Pass and Alturas and 104 miles between Grants Pass and Klamath Falls.²⁰ In addition, Charter states that the cable communities and KBLN are separated by numerous geographic barriers such as Aspen Butte, Buck Mountain and the Modoc National Forest.²¹ Charter argues further that KBLN does not appear to provide any programming that is specifically focused to either Klamath Falls or Alturas.²² Indeed, Charter notes that KBLN's own website states that it broadcasts the programming of the Three Angels Broadcast Network, an international Christian television and radio network with 31 affiliates nationwide, and other religious programs with no particular focus on the local needs and interests of the specific communities at issue.²³ Finally, Charter states that KBLN is not listed in the television programming guides for either the Klamath Falls *Herald and News* or the Alturas *Modoc County Record*.²⁴

8. KBLN argues that the Commission has found that the lack of a Grade B contour is not determinative, in and of itself.²⁵ Moreover, although Charter cites geographical barriers to KBLN's carriage, KBLN notes that Charter carries two Medford, Oregon stations that are divided from the communities by those same geographic boundaries.²⁶ In denying it carriage, KBLN asserts that Charter is being impermissibly discriminatory with respect to similarly-situated stations, particularly when KBLN can provide a legitimate signal to Charter's systems via a microwave link.²⁷ KBLN maintains that a substantial nexus between KBLN and the communities can be demonstrated by its efforts to produce and

¹⁶47 U.S.C. §534(h)(1)(C).

¹⁷Application at Exhibit 3.

¹⁸*Id.* at 4-5. Charter states that the distance for Klamath Falls is 81 miles and for Alturas 157 miles.

¹⁹*Id.* at 5, citing *Greater Worcester Cablevision, Inc.*, 13 FCC Rcd 2220 (1998) (39-70 miles); *Greater Worcester Cablevision, Inc.*, 12 FCC Rcd 17347 (1997) (38-61 miles); *Time Warner Cable*, 12 FCC Rcd 23249 (1997) (42-58 miles); *Time Warner Cable*, 11 FCC Rcd 13149 (1996) (45 miles); *Cablevision of Cleveland, L.P. and V Cable, Inc. d/b/a Cablevision of Ohio*, 11 FCC Rcd 18034 (1996) (41 miles).

²⁰*Id.* at 5.

²¹*Id.*

²²*Id.* at 6.

²³*Id.* at Exhibit 7.

²⁴*Id.* at Exhibit 8.

²⁵Opposition at 5, citing *Cablevision of Monmouth, Inc.*, 11 FCC Rcd 9314, 9321 (1996).

²⁶*Id.* at 4.

²⁷*Id.* at 4-5.

broadcast programming responsive to the needs and interests of the communities.²⁸ KBLN states that it produces six weekly programs that frequently feature on-air guests and participants from communities throughout the DMA, including Klamath Falls and Alturas.²⁹ KBLN states that it also has facilities for remote coverage of special events in the field and a weekly program, “Feature Presentation,” is devoted to broadcasting such coverage.³⁰

9. Charter argues that KBLN’s allegation of discrimination is without merit. Charter states that it does not carry any other stations licensed to Grants Pass and the two Medford stations that it carries are located nearly 30 miles closer to the cable communities than KBLN.³¹ Charter states that Medford and Grants Pass are also located in separate counties.³² In any event, Charter notes that the Commission has previously excluded cable communities from a station’s market, despite the fact that those communities carried other nearby stations.³³ Charter argues further that KBLN does not contest its lack of Grade B coverage or dispute the geographic distances between its community of license and the cable communities.³⁴ Moreover, Charter states that while KBLN’s commitment to deliver its signal via microwave may meet the “good quality signal” requirements for must carry purposes, this is not a test in a market modification proceeding.³⁵ Charter asserts, therefore, that KBLN’s reliance on its translator delivery is irrelevant in this proceeding. Finally, Charter argues that KBLN does not quantify the amount of its ostensibly “local programming” nor dispute the fact that the majority of its programming comes from the Three Angels Broadcasting Network.³⁶ Charter states that the limited examples KBLN provides do not specifically target Klamath Falls or Alturas although they may be of general statewide appeal.³⁷ Charter maintains that such generalized programming is insufficient to provide a nexus between KBLN and the communities.³⁸

²⁸*Id.*

²⁹*Id.* at Exhibit 1. KBLN states that its newsletter corroborates this schedule and describes various aspects of the station’s efforts to develop connections with the specific communities in the DMA. *See* Exhibit 2.

³⁰*Id.* at 6. KBLN states that its remote van provides remote coverage of various church services and other Christian oriented special events.

³¹Reply at 4.

³²*Id.* Charter states that Jackson County, where Medford is located, is immediately adjacent to Klamath County, where Klamath Falls is located.

³³*Id.* at 4-5, citing *Blue Ridge Cable Technologies, Inc.*, 14 FCC Rcd 2320 (1999); *Greater Worcester Cablevision, Inc., et al.*, 13 FCC Rcd 2220 (1998).

³⁴*Id.* at 6.

³⁵*Id.* at 7-8, citing *Brownwood Cable Television Service, Inc.*, 16 FCC Rcd 3108 (2001) (“translator coverage of a community does not lessen the relevance of the failure of the parent full power station to directly serve the subject cable communities and may not be used for the purpose of establishing a station’s market under the market modification procedures set forth in Section 614(h)(1)(C)(ii).”).

³⁶*Id.* at 8-9.

³⁷*Id.* at 9.

³⁸*Id.* at 9-10, citing *TCI Cablevision of New Mexico, Inc.*, 16 FCC Rcd 13959 (2001); *Brownwood Cable Television Service, Inc.*, 16 FCC Rcd 3108 (2001); *Norwell Television, LLC*, 16 FCC Rcd 21970 (2001); *Time Warner Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Cable*, 16 FCC Rcd 15279 (2001).

10. The third statutory factor we must consider is “whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community.”³⁹ Charter states that it currently carries several stations licensed to communities in and around Klamath and Modoc Counties, where the subject cable communities are located, most of which provide Grade A or Grade B service and extensive coverage of local news and sporting events.⁴⁰ In addition to these channels, Charter states that both systems carry religious programming provided by the Trinity Broadcast Network and the Hallmark Channel.⁴¹ KBLN argues that it provides a unique service that produces and airs programming of local interest that rely upon local intellectual resources that is completely absent from any other station or channel described by Charter.⁴²

11. The fourth statutory factor concerns “evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.”⁴³ Charter states that a viewership study it commissioned failed to reveal any ratings for KBLN in either cable or noncable households in Klamath or Modoc Counties.⁴⁴ KBLN concedes that it has little viewership, but it argues that it has been on-the-air for less than two years and the Commission has historically allowed new stations as much as three years to establish an audience.⁴⁵ Indeed, KBLN maintains, there is a potential audience in Klamath Falls as evidenced by a petition signed by over 100 residents of that community requesting its carriage.⁴⁶ KBLN argues, therefore, that its lack of ratings is not a relevant factor in this proceeding. Charter argues that, of the list of signatures included in Exhibit 3 to KBLN’s opposition, several fail to include full addresses or list addresses of communities other than those at issue here.⁴⁷ There is also no indication that any of the signatories are actual Charter subscribers or that any reside in Alturas.⁴⁸ As a result, Charter argues that this information is inconclusive and should be rejected.

12. Section 614(h)(1)(C) of the Communications Act authorizes the Commission to include or exclude particular communities from a television station’s market for the purpose of ensuring that a television station is carried in the areas which it serves and which form its economic market.⁴⁹ Section 614(h)(1)(C)(i) specifically and unambiguously directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism by taking such matters into account.⁵⁰ In this matter, KBLN has no history of carriage and no discernable viewership in the

³⁹47 U.S.C. §534(h)(1)(C).

⁴⁰Modification at Exhibits 4 and 8.

⁴¹*Id.* Charter states that the Alturas system also carries the Inspirational Life Network.

⁴²Opposition at 7.

⁴³47 U.S.C. §534(h)(1)(C).

⁴⁴Modification at Exhibit 9.

⁴⁵Opposition at 7, citing *DeSoto Broadcasting, Inc.*, 10 FCC Rcd 4494 (1995).

⁴⁶*Id.* at Exhibit 3.

⁴⁷Reply at 5-6.

⁴⁸*Id.* at 6.

⁴⁹47 U.S.C. § 534(h)(1)(c).

⁵⁰47 U.S.C. § 534(h)(1)(C)(i).

communities at issue. It does not appear that any proximate cable systems carry KBLN. As a relatively new specialty station, we do not afford considerable weight to these deficiencies. However, it is clear that KBLN is geographically distant from the communities (81 miles from Klamath Falls and 157 miles from Alturas); that it fails to provide a Grade B signal according to Longley-Rice and is separated by geographic barriers such as Aspen Butte and Buck Mountain; and that it provides minimal, if any, locally-focused programming. These factors also tend to explain the history of non-carriage of the station in the communities, and strongly indicate that the communities served by Charter are too distant to properly be a part of KBLN's television market. We therefore grant Charter's petition.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. §534, and Section 76.59 of the Commission's rules, 47 C.F.R. §76.59, that the captioned petition for special relief (CSR-6196-A), filed by Falcon Cable Systems Company II, L.P. d/b/a Charter Communications and Falcon Telecable, a California Limited Partnership d/b/a Charter Communications **IS GRANTED**.

14. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.⁵¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

⁵¹47 C.F.R. §0.283.